IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10730 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SALIM GULAM RASOOL @ DILIP QURESHI - Petitioner(s)
Versus
STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :
MS SHAHIN KURESHI FOR MM TIRMIZI for Petitioner(s) : 1,
MR ND GOHIL AGP for Respondent(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 06/07/2006

ORAL JUDGMENT

1. By filing this petition, the detenu has challenged his detention order dated 31-3-2006, by which the detenu is detained as a “Cruel Person” under Sec.2(bbb) under the Gujarat Prevention of

Anti Social Activities Act, 1985 [hereinafter referred to as "the PASA Act" for convenience]. With the detention order, the detenu is also served with the grounds of detention. In the grounds of detention, there is a reference to solitary case pending against the detenu. The aforesaid case is registered with the Mahudha Police Station vide CR No.I-52 of 2006 under secs.429, 279 and 114 of Indian Penal Code, under secs.5, 6 and 8 of Bombay Animal Preservation Act, 1954, under sec.11(L) of Prevention of Cruelty to Animals Act, and under sec.11(1)(L) of Cruelty to Animal Act, 1960, on 20/3/2006. It was alleged that the detenu was found in possession of 4 tones mutton of cows, bulls and calves. The detaining authority has also relied upon two statements of witnesses whose identities are not disclosed by the detaining authority claiming privilege under sec.9(2) of the PASA Act.

2. Learned advocate for the detenu submitted that except the aforesaid solitary criminal case pending against the detenu, there is no other material available for coming to the conclusion that the detenu is a "Cruel Person". She has further submitted that considering the solitary offence and the statements it cannot be said that the activities of the detenu are prejudicial to public health or that the detenu has violated public and order. She has further submitted that for branding a person as "Cruel Person" under sec.2(bbb), a person who is habitual to commit or abet to commission of the offence under the aforesaid act can be declared as "Cruel Person". She has submitted that the detenu is not a habitual to commit such type of offence. There is only solitary offence registered against the detenu and therefore, it cannot be said that the detenu is a habitual offender and therefore, the impugned order of detention is illegal. It is submitted that at the

most it can be said that the detenu has violated law and order and not public order. In order to substantiate his say, learned advocate for the detenu has relied upon the reported reasoned judgement and order passed by this Court (Coram : J.R. Vora, J.) in Special Civil Application No.13696 of 2004. Relevant paragraph Nos.11 to 13 of the said judgement reads as follows;

> “11. Now going through the provisions of the definition of “Cruel Person”, from the bare reading of the same, it becomes clear that the legislature intended such behaviours to be branded as behaviour of a cruel person when such person either by himself or as member or leader of a gang habitually commits or attempts to commit or attempts an offence punishable under Section 8 of theBombay Animal Preservation Act, 1954. The said Section 8 prescribes penalty for the contravention of the provisions of the said Act and the important provisions in the said Act, are grafted in Section 5 so far as the offence part is concerned whereby slaughtering of animals is made prohibited and restricted and is allowed only on certain conditions. There must be overt behaviour of habitually committing the offences as prescribed under the provisions of Bombay Animal Prevention Act, 1954, on the part of detenu, before he is branded as "cruel person".
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> 12. Habitually committing the offence refers to repetitive tendency of human conduct to commit the same act. It is necessary to refer here to the observations made by the Apex Court in the matter of GOPALANACHARI Vs. STATE OF KERALA, as reported in AIR 1981 S.C. 674, while dealing with terminology like "by habit", "habitual", "desperate", "dangerous, "hazardous" etc. with reference to Section 110 of the Code of Criminal Procedure. The Apex Court observed as under in paragraph No.6.
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> > "6. Article 21 insists that no man shall be deprived of his life or personal liberty except according to the procedure established by law. In Maneka Gandhi case(l) this Court in clearest terms strengthened the rule of law vis a vis personal liberty by insisting on the procedure contemplated by Art. 21 having to be fair and reasonable, not vagarious, vague and arbitrary:
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> > The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non- arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure

at all and the requirement of Article 21 would not be satisfied.

The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles, J., called "the justice of the common law".

Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of fundamental rights is not regarded as good politics and their transgression as bad politics. I sometimes pensively reflect that people's militant awareness of rights and duties is a surer constitutional assurance of governmental respect and response than the sound and fury of the 'question hour' and the slow and unsure delivery of court writ.....

To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available.[(1978) 1 SCC 248 at p. 338 (per Krishna Iyer,J.) : (AIR 1978 SC 597)]

The constitutional survival of s. 110 certainly depends on its obedience to Art. 21, as this Court has expounded. Words of wide import, vague amplitude and far too generalised to be safe in the hands of the Police cannot be constitutionalised in the context of Art. 21 unless read down to be as a fair and reasonable legislation with reverence for human rights. A glance at s. 110 shows that only a narrow signification can be attached to the words in clauses (a) to (g), "by habit a robber....", "by habit a receiver of stolen property....", "habitually protects or harbours thieve....", "habitually commits or attempts to commit or abets the commission of .... ", "is so desperate and dangerous as to render his being at large without security hazardous to the community". These expressions, when they become part of the preventive chapter with potential for deprivation of a man's personal freedom upto a period of three years, must be scrutinised by the court closely and anxiously. The poor are picked up or brought up, habitual witnesses swear away their freedom and courts ritualistically commit them to

> prison and Art. 21 is for them a freedom under total eclipse in practice. Courts are guardians of human rights. The common man looks upon the trial court as the protector. The poor and the illiterate, who have hardly the capability to defend themselves, are nevertheless not 'non-persons', the trial judges must remember, This Court in Hoskot's case has laid down the law that a person in prison shall be given legal aid at the expense of the State by the court assigning counsel. In cases under s. 110 of the Code, the exercise is often an idle ritual deprived of reality although a man's liberty is at stake. We direct the trial magistrates to discharge their duties, when trying cases under s. 11(), with great responsibility and whenever the counter-petitioner is a prisoner give him the facility of being defended by counsel now that Art. 21 has been reinforced by Art. 39A. Otherwise the order to bind over will be bad and void. We have not the slightest doubt that expressions like "by habit", "habitual", "desperate", "dangerous", "hazardous" cannot be flung in the face of a man with laxity of semantics. The Court must insist on specificity of facts and be satisfied that one swallow does not make a summer and a consistent course of conduct convincing enough to draw the rigorous inference - that by confirmed habit, which is second nature, the counter-petitioner . is sure to commit the offences mentioned if he is not kept captive. Preventive sections privative of freedom, if incautiously proved by indolent judicial processes, may do deeper injury. They will have the effect of detention of one who has not been held guilty of a crime and carry with it the judicial imprimatur, to boot. To call a man dangerous is itself dangerous; to call a man desperate is to affix a desperate adjective to stigmatise a person as hazardous to the community is itself a judicial hazard unless compulsive testimony carrying credence is abundantly available. A sociologist may pardonably take the view that it is the poor man, the man without political clout the person without economic stamina, who in practice gets caught in . the coils of s. 110 of the Code, although, we as court, cannot subscribe to any such proposition on mere assertion without copious substantiation. Even so, the court cannot be unmindful of social realities and be careful to require strict proof when personal liberty may possibly be the causality. After all, the judicial process must not fail functionally as the protector of personal liberty."

[Emphases supplied]

13. Now referring to the facts of the present case and the material relied upon by the detaining authority, it is clearly borne out that the detaining authority relied upon two aspects in scrutinizing the behaviour of the petitioner as aforesaid. Out of these two aspects, filing of criminal case against the petitioner for the

> breach of the provisions of Bombay Animal Preservation Act, 1954 could hardly be said to be a material exhibiting habitual tendency of the petitioner to commit such offences. In view of what is observed by the Apex Court in the above said decision of GOPALANACHARI [supra]. Confusion which is likely to arise at this juncture is whether a solitary crime registered against the detenu is sufficient to warrant action under preventive detention law. It is required to be explained that the question in this case, does not arise whether a solitary crime registered against the detenu is sufficient to detain the petitioner, but question precisely arises having regard the statutory provisions in the shape of Section 2(bbb) whether merely filing of a case, which is still to be tried, the person can be branded as habitual offender, which is a prime requirement for detention under the PASA Act as a cruel person. On going through the investigation papers thoroughly it is nowhere emanated that the behaviour of the petitioner disclosed through the investigation in the said crime leads to infer that the petitioner was habitual offender within the meaning of Section 2(bbb) of the PASA Act."

3. In the aforesaid reported judgement, this Court has held that if a person is not habitual to commit the offence, he cannot be branded as "Cruel Person". In the present case, it is not in dispute that only one offence is registered against the detenu relying on which the detaining authority has passed the impugned order of detention. Considering the aforesaid reported decision of this Court and considering the fact that there is only one offence is registered against the detenu, it cannot be said that the detenu is habitual to commit the aforesaid wrong and therefore, the impugned order is required to be quashed and set aside.

4. In view of what is stated herein above, this petition is allowed. The impugned order of detention dtd.31/3/2006 is quashed and set aside. The detenu – Salim Gulam-Rasuli alias Dilip Qureshi is ordered to be released forthwith unless his presence is required in connection with any other case. Rule is made absolute with no order as to costs.

5. In order to see that the detenu is not tempted to repeat the offence, the learned advocate appearing on behalf of the detenu has made a statement that the detenu will not leave Mahudha Taluka till 30/9/2006, except for attending the Criminal case. The voluntary statement is recorded. However, it is for the concerned authority to monitor the same.

(P.B.MAJMUDAR,J.)

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